

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER LIPSEY, JR.,

Plaintiff,

vs.

R. DIAZ, et al.,

Defendants.

1:20-cv-01010-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE,
FOR PLAINTIFF'S FAILURE TO
COMPLY WITH COURT'S ORDER
(ECF No. 6.)**

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS**

Christopher Lipsey, Jr. ("Plaintiff"), is a state prisoner proceeding *pro se* with this civil rights action. On July 21, 2020, Plaintiff filed the Complaint commencing this action. (ECF No. 1.)

On September 29, 2019, the court issued an order requiring Plaintiff to pay the \$400.00 filing fee for this action in full within thirty days under the three strikes provision of 28 U.S.C. § 1915(g). (ECF No. 6.) The thirty-day time period has now expired and Plaintiff has not paid the filing fee or otherwise responded to the court's order.

In determining whether to dismiss this action for failure to comply with the directives set forth in its order, "the Court must weigh the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of

1 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
2 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639,
3 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (failure
4 to comply with court orders). see also In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to
5 prosecute).

6 ““The public’s interest in expeditious resolution of litigation always favors dismissal,”
7 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
8 action has been pending since July 21, 2020. Plaintiff’s failure to respond to the court’s order
9 may reflect Plaintiff’s disinterest in prosecuting this case or his inability to pay the filing fee. In
10 such an instance, the court cannot continue to expend its scarce resources assisting a litigant who
11 will not or cannot resolve payment of the filing fee for his lawsuit. Thus, both the first and second
12 factors weigh in favor of dismissal.

13 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
14 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently
15 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and it
16 is Plaintiff’s failure to pay the filing fee for this action that is causing delay. Therefore, the third
17 factor weighs in favor of dismissal.

18 As for the availability of lesser sanctions, at this stage in the proceedings there is little
19 available to the court which would constitute a satisfactory lesser sanction while protecting the
20 court from further unnecessary expenditure of its scarce resources. Monetary sanctions in this
21 circumstance are of little use, and given the early stage of these proceedings, the preclusion of
22 evidence or witnesses is not available. However, inasmuch as the dismissal being considered in
23 this case is without prejudice, the court is stopping short of issuing the harshest possible sanction
24 of dismissal with prejudice.

25 Finally, because public policy favors disposition on the merits, this factor will always
26 weigh against dismissal. Id. at 643.

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1 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed, without
2 prejudice, based on Plaintiff's failure to obey the court's order of September 29, 2020, which
3 required him to pay the filing fee in full for this action.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
6 (14) days after the date of service of these findings and recommendations, Plaintiff may file
7 written objections with the court. Such a document should be captioned "Objections to
8 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
9 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
10 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
11 (9th Cir. 1991)).

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13 IT IS SO ORDERED.

14 Dated: November 23, 2020

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE